STATE OF WISCONSIN
Department of Commerce

In the Matter of the PECFA Appeal of-.

Chuck Van Zeeland
Van Zeeland Oil Co. Inc.
P.O. Box 208
Little Chute, Wisconsin 54140-0208

PECFA Claim: 4 54956-3206-20
Hearing: 497-155

Final Decision

Preliminary Recitals

Pursuant to a Petition for Hearing filed October 16, 1997, under §101.02 (6) (e) Wis. Stats., and §Comm/ILHR 47.53 Wis. Adm. Code, to review a decision by the Wisconsin Department of Commerce (Department), a hearing was commenced on November 11, 1998 at Madison, Wisconsin. A Proposed Hearing Officer Decision was issued on May 20, 1999, and the parties were provided a period of twenty (20) days to file objections.

The Issues for determination is:

Whether the Department's September 24, 1997 decision to deny PECFA reimbursement for costs totaling $32,461.88 was correct.

There appeared in this matter the following persons:

PARTIES IN INTEREST:

Chuck Van Zeeland
Van Zeeland Oil Co. Inc.
P. O Box 208
Little Chute, Wisconsin 54140-0208

By: Daryl W. Laatsch, Esq.
Daryl W. Laatsch, S.C.
1727 Barton Ave.
West Bend, Wisconsin 53090

Wisconsin Department of Commerce
PECFA Bureau
201 W. Washington Avenue
P.O. Box 7838
Madison, Wisconsin 53707-7838

By: Kelly Cochrane, Esq.
Assistant Legal Counsel
Wisconsin Department of Commerce
201 W. Washington Avenue, Room 322A
P.O. Box 7838
Madison, Wisconsin 53707-7838

The authority to issue a Final Decision in this matter has been delegated to the undersigned by the Secretary of the Department pursuant to §560.02(3) Wis. Stats.

The matter now being ready for Final Decision I hereby issue the following:

FINDINGS OF FACT

The Findings of Fact in the Proposed Hearing Officer-Decision cited above are hereby adopted for purposes of this Final Decision.

CONCLUSIONS OF LAW

The Conclusions of Law in the Proposed Hearing Officer Decision cited above are hereby adopted for purposes of Final Decision.

DISCUSSION

The Discussion in the Proposed Hearing Officer Decision cited above is hereby adopted for purposes of Final Decision.

FINAL DECISION

The Proposed Hearing Officer Decision cited above is hereby adopted as the Final Decision of the Department.

NOTICE TO PARTIES

Request for Rehearing

This is a final agency decision under §227.48 Wis. Stats. If you believe this decision is based on a mistake in the facts or law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not have discovered sooner through due diligence. To ask for a new hearing, send a written request to Office of Legal Counsel, Wisconsin Department of Commerce, 201 West Washington Avenue, P.O. Box 7970, Madison, Wisconsin 53707-7970.

Send a copy of your request for a new hearing to all the other parties named in this Final Decision as "PARTIES IN INTEREST".

Your request must explain what mistake you believe the hearing examiner made and why it is important of you must describe your new evidence and tell why you did not have it available at the hearing in this matter. If you do not explain how your request for a new hearing is based on either a mistake of fact or law or the discovery of new evidence which could not have been discovered through due diligence on your part, your request for a new hearing will be denied.

Your request for a new hearing must be received by the Department's Office of Legal Counsel no later than twenty (20) days after the mailing date of this Final Decision as indicated below. Late requests cannot be reviewed or granted. The process for asking for a new hearing is set out in §227.49 Wis. Stats.

Petition For Judicial Review

Petitions for judicial review must be filed not more than thirty (30) days after the mailing of this Final Decision as indicated below (or thirty (30) days after the denial of a denial of a request for a rehearing, if you ask for one). The petition for judicial review must be served on the Secretary, Office of the Secretary, Wisconsin Department of Commerce, 201 West Washington Avenue, P.O. Box 7970, Madison, Wisconsin 53707-7970.

The petition for judicial review must also be served on the other "PARTIES IN INTEREST" or each party's attorney of record. The process for judicial review is described in § 227.53 Wis. Stats.

Dated: 01-10-2000

Terry W. Grosenheider
Executive Assistant
Wisconsin Department of Commerce
201 West Washington Avenue

P.O. Box 7970
Madison, Wisconsin 53707-7970

Copies to:

Above identified "PARTIES IN INTEREST", or their legal counsel if represented.

Joyce Howe, Office Manager
Unemployment Insurance Hearing Office
1801 Aberg Avenue, Suite A
Madison, Wisconsin 53707-7975

Date Mailed: 1/11/00

Mailed By: Noelle Hatleberg

STATE OF WISCONSIN
DEPARTMENT OF INDUSTRY LABOR AND HUMAN RELATIONS

IN THE MATTER OF: The claim for
Reimbursement under the PECFA
Program by

Chuck Van Zeeland

MADISON HEARING OFFICE
1801 Aberg Ave., Suite A
P.O. Box 7975
Madison, WI 5370 ' 7-7975
Telephone: (608) 242-4818
Fax: (608)242-4813

Hearing Number: 97-155
Re: PECFA Claim 54956-3206-20

PROPOSED HEARING OFFICER DECISION

NOTICE OF RIGHTS

Attached are the Proposed Findings of Fact, Conclusions of Law, and Order in the above-stated matter. Any party aggrieved by the proposed decision must file written objections to the findings of fact, conclusions of law and order within twenty (20) days from the date this Proposed Decision is mailed. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your objections and argument to: Madison Hearing Office, P.O. Box 7975, Madison, WI 53707-7975. After the objection period, the hearing record will be provided to Christopher Mohrman, Deputy Secretary of the Department of Commerce, who is the individual designated to make the FINAL Decision of the department in this matter.

STATE HEARING OFFICER:
James H. Moe

DATED AND MAILED:
May 20, 1999

* *

MAILED TO:

Appellant Agent or Attorney

Attorney Daryl Laatsch
1727 Barton Avenue
West Bend, WI 53090

Department of Industx-y, Labor and Human Relations

Kelly Cochrane
Assistant Legal Counsel
P.O. Box 7970
Madison, WI 53707-7970

jtl

STATE OF WISCONSIN
DEPARTMENT OF WORKFORCE DEVELOPMENT

In the Matter of the claim for Reimbursement under the PECFA Program by

Chuck Van Zeeland
Van Zeeland Oil Co.
PO Box 208
Little Chute, WI 54140-0208

Hearing No. 97-155
PECFA Claim No. 54956-3206-20

PROPOSED DECISION

On September 24, 1997, the Department of Commerce (department) issued a decision denying the request by Van Zeeland Oil Co. (appellant) for reimbursement of costs totaling $32,461.88 under the PECFA program. The denied amounts were for costs associated with a soil vapor extraction system ($23,536.99), volatile organic compound testing ($2330) and certain mileage charges ($11.20). Van Zeeland Oil Co., filed a timely appeal and, pursuant to its appeal, a hearing was held on November 11, 1998 before James H. Moe, acting as state hearing officer.[1]

Based on the applicable records and evidence in this case, the hearing officer makes the following

PROPOSED FINDINGS OF FACT

At all times material, Chuck Van Zeeland, doing business as Discount Tire and Auto, was the legal owner of the premises located at 220 West Cecil Street in Neenah, Wisconsin. The subject property contained several underground petroleum storage tanks that were removed and replaced. Petroleum contamination was ultimately discovered at the site. The appellant then contracted with Cooper Environmental Resources, Inc. (Cooper) to remediate the site.

As a remedial option at the site, Cooper concluded that a soil vapor extraction (SVE) system coupled with groundwater depression pumping appeared to be the most cost effective choice and presented the lowest structural damage risk to the existing building. Installation of the SVE system began in May of 1991. By letter dated August 25, 1992, the Wisconsin Department of Natural Resources (DNR) approved the plan to treat petroleum-contaminated soil at the site with an SVE system. Start-up testing of the SVE system, conducted upon completion, confirmed that it was operating as designed.

[1] At the hearing, the appellant withdrew that portion of its appeal addressing the denied mileage costs.

Vapor extraction is an *in situ* vacuum stripping of volatile compounds from the soil. An SVE system will not clean below the groundwater table. The operation of the SVE system was predicated on the ability of the ground water system to adequately depress the water table and expose the petroleum-

impacted soil. Adequate groundwater depression was not achieved to allow any extended operation of the SVE system. Due to the high water table, the SVE system took in water and would shut down after only one and one-half to three days. Cooper initially sent workers to restart the system but ultimately concluded that it not cost effective to continue doing so. The SVE system was entirely non-operational in 1994 and 1995. DNR approval was needed before Cooper could make any modifications to the SVE system.

As part of its claim, the appellant also submitted costs for Volatile Organic Compound (VOC) testing, done in 1993 and thereafter. In response to the department's request for additional information during the review of the claim submitted, Cooper sent a letter explaining that the VOC testing was completed as a requirement of the City of Neenah sanitary sewer discharge system permit. With that correspondence, Cooper included a table of "ineligible" laboratory costs associated with the VOC testing. Those were the same amounts denied by the department because the testing was for constituents unrelated to petroleum.

PROPOSED DISCUSSION AND CONCLUSIONS OF LAW

I. Reimbursement of costs associated with SVE system.

The department denied reimbursement for the costs associated with the installation of the SVE system because it was "ineffective" within the meaning of Wis. Stat. §101.143.

The appellant argues that Chapter ILHR 47.30(2)(b)l of the Wisconsin Administrative Code governs reimbursement of the costs associated with the SVE system. The respondent argues that the provisions of Wis. Stat. §101.143, Stats., apply because those costs were incurred prior to the promulgation of the code provisions.

The appellant notes that Wis. Stat. §101.143(4)(a)l provides that the department shall issue an. award if it finds that the claimant meets all of the requirements "of this section and any rules promulgated under this section..." The appellant further notes that. Wis. Stat. §101.143(4)(d)l provides that the department shall issue an award for eligible costs "incurred on or after August 1, 1987, and before July 1, 1998…" Based on those two sections, the appellant contends that treating costs differently based on the date incurred is contrary to the authority conferred by Wis. Stat. §101.143. The state hearing officer disagrees. The statutory language clearly provides the department with authority to promulgate rules. However, at the time most of the SVE system's costs were incurred, no such rules had been promulgated.

The Department promulgated an emergency administrative rule which became effective January 1, 1993. The emergency rule was reissued as a permanent rule effective March 1, 1994. The effective date of rules is governed by Wis. Stat. §227.22, which provides that a rule is effective on the first day of the month following publication unless the statute under which the rule was promulgated prescribes a different effective date. Wis. Stat. §101.143 does not prescribe a different effective date. Similarly, Wis. Stat. §227.24 governs emergency rules and provides that such rules take effect upon publication the official state newspaper or any later date specified in the rule.

Since the most of the costs associated with the SVE system were incurred prior to the effective date of either the emergency rule or the permanent rule, Wis. Stat. §101.143 provides the legal authority for determining the eligibility of costs.

Wis. Stat. §101.143(4) AWARDS FOR PETROLEUM PRODUCT INVESTIGATION, REMEDIAL ACTION PLANNING AND REMEDIAL ACTION ACTIVITIES.

(b) Eligible costs. Eligible costs under an award under par. (a) include actual costs or, if the department establishes a schedule under par. (cm), usual and customary costs for the following items only:

14. Other costs identified by the department as necessary for proper investigation, remedial action planning and remedial action activities to meet the requirements of s. 292.11.

(c) Exclusions from eligible costs. Eligible costs for an award under par. (a) do not include the following:

3. Other costs that the department determines to be associated with, but not integral to, the eligible costs incurred because of a petroleum products discharge from a petroleum product storage system or home oil tank system.

4. Costs, other than costs for compensating 3rd parties for bodily injury and property damage, which the department determines to be unreasonable or unnecessary to carry out the remedial action activities as specified in the remedial action plan.

The department also created PECFA Overviews, which were informal departmental interpretations of Wis. Stat. §101.143, prior to the adoption of the emergency rule and the permanent rule. Those overviews provided that costs associated with inefficient, ineffective or non-cost effective cleanup actions were not eligible for reimbursement.

The above-referenced statutory language provides the department with considerable discretion to pass its judgment on the appellant's claim within the guidelines and categories established therein. The appellant is entirely correct that the PECFA program overviews provided by the department are not legally binding. However, those overviews put parties on notice of the department's expectations under the statutes.

The department has determined that the SVE system here was ineffective because it was not operated on any extended basis after installation. The appellant asserts that the SVE system in combination with the groundwater pumping system were effective. The appellant explained that even when taking in groundwater the SVE system was removing contaminants because any petroleum contaminants which were in the groundwater would be taken into the system first. However, as the site assessment documents show, the SVE system was specifically designed to remediate petroleum-impacted soil. It was not originally designed to take in groundwater. Other than the consultant's testimony that he was "sure [the SVE system] was [having an effect on contamination]," no evidence was presented to show that any soil remediation resulted from the SVE system or that it contributed to any reduction in contaminants at the site.

Under the circumstances, reimbursement of the costs related to the SVE system incurred prior to January 1, 1993 were properly denied.

Several invoices submitted for reimbursement covered work performed on the SVE system after January 1, 1993.[2] Based on the date those costs were incurred, the emergency rule of Chapter ILHR 47

of the Wisconsin Administrative Code applies. The administrative code specifies in more detail the process for determining award amounts. Chapter ILHR 47.30(2)(b)l provides for a two-part analysis, and denies reimbursement for costs associated with incompetent or non-effective cleanup actions which were not based on sound professional and scientific judgment.

For the reasons explained above, the state hearing officer has concluded that the SVE system was non-effective. The consultant evaluated several alternatives here and determined that the SVE system was the lowest-cost alternative. Moreover, the testimony of the consultant and the SVE installer established that at the time such systems were touted by various government agencies responsible for regulating the environment. In its site report, Cooper recognized that the limitations of the SVE option included the relative low permeability of the site soils and the relatively high water table. The consultant's assessment was performed using the degree of care and skill ordinarily exercised by similar professional consultants in the field. As such, the appellant has established that sound professional judgment was utilized in selecting the SVE system. Accordingly, the denied costs associated with the two above-described invoices are reimburseable.

[2]Petro-Chemical Systems, Inc. invoice #2462 for costs incurred on January 14 and 18, 1993 totaling $691.45, and Cooper Environmental Resources, Inc. invoice # 1 0790 for costs incurred in February 1993 totaling $130.

II. Reimbursement of costs associated with VOC testing.

The appellant asserts that the costs associated with the VOC testing are reimbursable pursuant to the provisions of ILHR 47.30(2)(c)3 which provides that "[c]osts associated with full VOC testing after the investigation phase [are ineligible for reimbursement], unless required by the DNR for monitoring PECFA eligible products and the DNR letter documenting the requirement is submitted with the claim."

The appellant contends that full VOC testing was required pursuant to a May 19, 1992, letter from the Wisconsin Department of Natural Resources to the appellant which stated as follows: "Your consultant should also follow the Department's 'Guidance for Conducting Environmental Response Actions.'" However, the appellant has failed to establish that the general language of that letter amounts to a specific instruction to perform full VOC testing within the meaning of the above-referenced code section. Moreover, the appellant's consultant specifically explained in its April 2, 1997 letter (department's Exhibit C) that the VOC analysis was required by the city of Neenah. While the city might well have required such testing, the testing was not for any covered petroleum product and therefore not eligible for PECFA reimbursement. In addition, the consultant's April 2 letter specifically identified certain amounts as "ineligible groundwater analysis costs." Those are the precise costs denied by the department. Under the circumstances, the appellant had failed to establish that. the denied costs are reimbursable.

PROPOSED CONCLUSIONS OF LAW

The state hearing officer therefore finds that the department was correct in denying reimbursement of costs of $ 22,715.54 for services of Cooper Environmental Resources, Inc., on the basis that those services were unreasonable and unnecessary within the meaning of Wis. Stat. §101.143.

The state hearing officer further finds that the department was incorrect in denying to deny reimbursement of costs of $691.45 for the services of Petro-Chemical Systems, Inc. and costs of $130 for Cooper Environmental Resources Inc., on the basis that those costs were for a non-effective system within the meaning of Wis. Stat. §101.143 and Chapter ILHR 47 of the Wisconsin Administrative Code.

The state hearing office further finds that the department was correct in denying reimbursement of costs of $450 for Petro-Chemical Systems, Inc.; $360 for Suburban Laboratories of Wisconsin, Inc.; $860 for Precision Analytical Laboratory, Inc.; and $660 for EnChem Inc., on the basis that those costs were not eligible within the meaning of Wis. Stat. §101.143 and Chapter ILHR 47 of the Wisconsin Administrative Code.

PROPOSED DECISION

The department shall reimburse the appellant an additional $821.45, the total of the approved costs in the findings and conclusions above. The department's decision to deny all other contested amounts is affirmed.

By
James H. Moe
State Hearing Officer